# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1943

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## No. 322 - 324

ATTILLIO SEMERIA, FRED FATTOR, CHARLES OSTERLYE, RALPH ROW, F. B. CODY, GEORGE MCBEAN, JACK MILLS, GALE PICKARD, ADOLPH LORENZETTI and CHARLES HARDY,

*Petitioners,*

vs.

THEODORE ROSENBERG, GUSSIE ROSENBERG, DOROTHY AIRHART, JUNE HOROWITZ and SIDNEY ROSENBERG, individually and as copartners transacting business under the firm name of American Building Maintenance Co. (a copartnership), and AMERICAN BUILDING MAINTENANCE CO. (a copartnership),

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

MILTON D. SAPIRO,
Mills Tower, San Francisco, California,
*Counsel for Petitioners.*

CHARLES R. GARRY,
Mills Tower, San Francisco, California,

ALBERT PICARD,

FRANCIS MCCARTY,
Financial Center Building, San Francisco, California,
*Of Counsel.*

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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*Respondents.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**for the Ninth Circuit.**

*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

Petitioners Attillio Semeria, Fred Fattor, Charles Osterlye, Ralph Row, F. B. Cody, George McBean, Jack Mills, Gale Pickard, Adolph Lorenzetti and Charles Hardy, pray that a writ of Certiorari be issued to review the judgments of the United States Circuit Court of Appeals for the Ninth Circuit entered August 17, 1943.

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**OPINIONS BELOW.**

The opinion and dissenting opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 1306-1312) are not yet reported. The opinion of the District Court (R. 147-176) is reported at 45 F. Supp. 128. The judgments of the Circuit Court of Appeals were entered August 17, 1943. (R. 1313-1315.)

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**JURISDICTION.**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. Code, Section 347.)

## STATUTES INVOLVED.

These actions were brought under the Fair Labor Standards Act of 1938. (52 Stat. 1060, 29 U. S. C. Section 201, et seq.) The pertinent sections of the foregoing statutes are set forth in the appendix, infra, pages i-iii.

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## QUESTIONS PRESENTED.

1. Whether employees who make habitable the establishments of banks engaged in interstate commerce by performing janitorial services necessarily required by the banks in order to perform their interstate transactions and whose services are necessary and indispensable to the conduct by the banks of their interstate business are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938.

2. Whether a bank in the performance of its multiple daily functions is engaged in the production of goods for commerce as well as engaged in commerce.

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## STATEMENT.

This petition relates to three final judgments of the United States Circuit Court of Appeals for the Ninth Circuit reversing three final judgments of the District Court of the United States for the Northern District of California, Southern Division, granting recovery to petitioners herein for unpaid overtime compensation and additional equal amounts as liquidated dam-

ages and attorneys' fees. This petition is necessarily upon a single record, inasmuch as the three appeals were upon a single record. The suits were instituted pursuant to Section 16(b) of the Fair Labor Standards Act of 1938. The cases in the Circuit Court entitled "Rosenberg et al., Appellants, v. Semeria, et al., Appellees (10282), and Rosenberg, et al., Appellants, v. Lorenzetti, Appellee (10283)" were tried together in the District Court. The issues and evidence in the case entitled "Rosenberg, et al., Appellants, v. Hardy (10284)", it was stipulated, were "substantially the same" as in the other two. (R. 1222-1223.)

Respondents are a copartnership which renders janitorial services for owners and lessees of apartment houses, office buildings and the like on a contractual basis. Among those having contracts with respondents are Wells-Fargo Bank & Union Trust Company, the American Trust Company, and The Anglo-California National Bank of San Francisco. (R. 890-891; 1066; 1074; 1082; 1090; 898; 906; 915; 923; 122; 862; 1223; 933.) These banks are engaged in interstate commerce (R. 238-483; 499-550; 595-613; 1122-1143), and this was conceded by respondents in the Court below. (R. 1307.)

Petitioners are employees employed and paid by respondents to do the janitorial work in these banks pursuant to the afore-mentioned service contracts. (R. 40-41; 1046-1048; 1223-1224.) They sweep, mop and dust, empty waste-paper baskets, polish cuspidors, clean toilets and wash down the walls thereof, vacuum

rugs, empty ink-wells, sweep the sidewalks, etc. (R. 936.)

It was conceded that "no overtime was paid to any of these janitors for the first 48 hours of their work in any week" (R. 494), and there was agreement as to the amounts that would be owing if petitioners were held covered by the Act. (R. 993-995; 1240-1266.) The District Court rendered judgments awarding overtime compensation, liquidated damages, attorneys' fees and costs to the petitioners against respondents. (R. 191; 1170; 176.)

In its findings of fact and conclusions of law the District Court held as follows (R. 178-190; 1157-1169; 1268-1280):

1. Each of the banks was "an industry engaged in interstate commerce" and "an instrumentality of interstate commerce", made constant use of "interstate and foreign communication facilities" and was constantly involved in "interstate communication of a business nature". (R. 181; 1160; 1271; 187; 1166; 1277.)

2. The banks "could not properly carry on * * * business without the janitorial services". They depended "to a considerable degree" upon the appearance of their establishments "to inspire public confidence", and, as their officers and employees could not work properly in buildings "littered with dirt and debris", the work of the janitors was "indispensable" to the banks' business. The janitorial services "facilitated" the banks' interstate business

and the janitors were, therefore, engaged in interstate commerce within the meaning of the Act. (R. 183-184; 1162-1163; 1273-1274.)

3. The janitors were the employees of The Maintenance Company and were not employees of the banks. (R. 183; 1162; 1273; 188; 1167; 1278.)

4. The Maintenance Company was not a "service establishment" within the meaning of Section 13(a)(2) and the employees were not, therefore, excluded from the benefits of the Act. (R. 184; 188; 1163-1164; 1167; 1274-1275; 1278.)

5. The Act was not unconstitutional as applied to the Maintenance Company or to the employees. (R. 186-187; 188-189; 1165-1166; 1167-1168; 1277; 1278-1279.)

6. None of the claims were barred by California statutes of limitations. (R. 189; 1168; 1279.)

In consonance with its finding that the work of the janitors was "indispensable" to and "facilitated" the business of the banks the Court held the janitors to be within the coverage of the Act. (R. 169.)

The Circuit Court of Appeals reversed, holding that the holding in *McLeod v. Threlkeld,* ..... U. S. ..... (June 7, 1943), was controlling. The Circuit Court further held that petitioners were not in any sense engaged in production, nor were their activities integrated with the production of goods, thereby distinguishing the case from *Kirschbaum Co. v. Walling,* 316 U. S. 517. (R. 1308.)

In the dissenting opinion, Mr. Justice Denman held that the judgment should be affirmed as to all petitioners except Semeria, holding that petitioners were engaged " 'in actual work upon transportation (interstate) facilities' as that phrase is used in *McLeod v. Threlkeld,* 218 (sic.) U. S. ..... (June 7, 1943)." Mr. Justice Denman also pointed out that not only were the services of petitioners a direct aid to interstate commerce, but that it was conceivable that a bank which had no janitorial services and permitted the litter of its transactions and its dust and dirt to accumulate would cease to function. (R. 1309-1310.)

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**SPECIFICATION OF ERRORS TO BE URGED.**

The Circuit Court of Appeals erred:

1. In holding that petitioners were not engaged in commerce within the meaning of the Act.

2. In holding that petitioners were not engaged in the production of goods for commerce within the meaning of the Act.

3. In reversing the judgment of the District Court.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

### 1. THE DECISION OF THE COURT BELOW AFFECTS THOUSANDS OF EMPLOYEES THROUGHOUT THE UNITED STATES AND HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This is the only litigated case involving janitors who devote their entire time to the maintenance of premises used solely by a bank for the purpose of conducting its interstate and foreign banking businesses. The janitors do no other work. Consequently in the thousands of banks throughout the United States there are multiple thousands of similar employees who will be directly affected by the decision involved herein.

This is an important question of federal law which has not been, but should be, settled by this Court. To date four judges have passed upon this question in this case and have divided equally. Hon. A. F. St. Sure, District Judge, held petitioners were entitled to the benefits of the Act, as did Mr. Justice William Denman in his dissenting opinion in the Court below. Mr. Justices William Healy and Francis A. Garrecht held in the majority opinion of the Court below that petitioners were not entitled to the benefits of the Act.

**2. THE DECISION OF THE COURT BELOW ON THE QUESTION OF WHETHER A BANK IS ENGAGED IN PRODUCING GOODS FOR COMMERCE WHEN IT CREATES CHOSES IN ACTION IS ERRONEOUS IN THAT IT CONFLICTS WITH SPECIFIC PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938, AND WITH THE DECISION OF THIS COURT IN KIRSCHBAUM CO. v. WALLING, 316 U. S. 517.**

Since the bank actually "produced" or issued various types of commercial paper such as drafts, bills of exchange, letters of credit, and also new issues of stock, it was literally engaged in the production of goods within the meaning of sections 3j and 3i of the Act. In addition, it supplied information on request to investors. (R. 508-512.) "Intelligence or information", the Supreme Court has pointed out, is a subject or article of commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103; *International Textbook Co. v. Pigg*, 217 U. S. 91. Similarly, printed or written materials and commercial instruments of all types have been considered articles of commerce. *Champion v. Ames*, 188 U. S. 321; *Almy v. California*, 24 How. 169.

See also:

*United States v. Ferger*, 250 U. S. 199, 205;

*Bracey v. Darst*, 218 Fed. 482, 495-496 (N. D. W. Va.);

*Oklahoma-Texas Trust Co. v. Securities and Exchange Comm.*, 100 F. (2d) 888, 890 (C. C. A. 10);

*Geiger-Jones Co. v. Turner*, 230 Fed. 233 (S. D. Ohio).

If the banks are engaged in the production of goods for commerce, the janitors are subject to the Act

under *Kirschbaum Co. v. Walling,* supra, and the decision of the Court below conflicts with the decision of this Court in the *Kirschbaum* case. Even if the banks are only engaged in commerce, as distinguished from production, the decision of the Court below conflicts with the decision of this Court in the *Kirschbaum* case because that case held maintenance men indispensable. This is pointed out by Mr. Justice Denman in his dissent in the Court below. (R. 1310.)

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**3. THE DECISION OF THE COURT BELOW ON THE QUESTION OF WHETHER EMPLOYEES MAINTAINING AN INSTRUMENTALITY OF COMMERCE ARE COVERED BY THE ACT CONFLICTS WITH THE DECISION OF THIS COURT IN OVERSTREET v. NORTH SHORE CORPORATION, 318 U. S. 125.**

In *Overstreet v. North Shore Corporation,* supra, this Court held that employees maintaining an instrumentality of commerce are covered by the Act. This Court stated that the services involved were a direct aid to interstate commerce. In the instant case the instrumentality of commerce is a bank rather than a highway, but the employees bear the same relation to its maintenance as the employees in the *Overstreet* case bore to the maintenance of that instrumentality. This analogy was specifically commented upon by Mr. Justice William Denman in his dissenting opinion in the instant case where he stated:

> "There seems no difference between removing the discarded papers used in the interstate banking transactions, cleaning the ink wells after their use in writing and signing such documents,

making habitable by janitorial services the premises *necessarily* required to perform such interstate transactions and the functions of the railway gang which cleans the passenger coaches carrying persons interstate. Both appear services necessary to the conduct of interstate business. In both cases they are engaged 'in actual work upon the transportation (interstate) facilities' as that phrase is used in McLeod v. Threlkeld, 218 U. S. ..... (June 7, 1943)." (R. 1309.)

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**4. THE DECISION OF THE COURT BELOW WITH RELATION TO THE COVERAGE TO BE EXTENDED TO EMPLOYEES ENGAGED IN COMMERCE CONFLICTS WITH THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FOURTH CIRCUIT IN BURTON v. ZIMMERMAN, 131 FED. (2d) 377.**

In *Burton v. Zimmerman,* supra, it was held that whether janitors who maintain office buildings, the tenants of which were engaged in interstate commerce, were entitled to the benefits of the Fair Labor Standards Act of 1938, depended upon the facts of each case, and depended upon whether or not the services of the janitors were essential to such commerce. The decision of our Court below holds that regardless of whether the services of janitors in establishments engaged in commerce are a direct aid to such commerce and are indispensable to such commerce, such janitors are not entitled to any benefits under the Fair Labor Standards Act of 1938.

5. **THE DECISION OF THE COURT BELOW ON THE QUESTION OF WHETHER THE JANITORS INVOLVED ARE ENGAGED IN COMMERCE CONSTITUTES A MISINTERPRETATION OF THE DECISION OF THIS COURT IN McLEOD v. THRELKELD, ..... U. S. ..... (JUNE 7, 1943), AND IS IN CONFLICT WITH SAID DECISION.**

In the *McLeod* case this Court held that a cook for maintenance workers of a railroad was not engaged in commerce. The instant case concerns the maintenance workers themselves. Furthermore, in the *McLeod* case the cook was held too remote from "transportation", the only possible "commerce" in the case. In the instant case "commerce" is "trade, commerce, transmission or communication". The bank is the instrumentality which conducts the commerce as the railroad or highway conducts transportation, and the employees involved herein maintain the bank as the employees in the *Overstreet* case maintained the highway.

In the dissenting opinion Mr. Justice Denman correctly interprets the *McLeod* case and holds that petitioners herein are entitled to coverage under the language of the *McLeod* case. (R. 1309.) Following such holding Mr. Justice Denman states:

> "Merely cooking food for the men who maintain an interstate right of way seems a step substantially removed from cleaning the cars used in such transportation. Because an interstate bank's premises are immobile and the cars move is no ground of distinction. For an analogy to support the majority opinion the Supreme Court would have to hold that one employed in the cleaning of railway tools and tool houses, both

facilities of the maintenance of way men, was not serving interstate commerce.

The question is whether the services are a direct aid to interstate commerce. Here it is not only such an aid but it is conceivable that a bank which had no janitorial service and permitted the litter of its transactions and its dust and dirt to accumulate would cease to function. I can see no difference between the 'porters (who) keep the buildings clean and habitable' for the men and processes for the production of goods for commerce held within the Act in Kirschbaum Co. v. Walling, 316 U.S. 517, 519, and the janitors who keep the buildings clean and habitable for the men and processes in interstate banking. I do not believe that McLeod v. Trelkeld overruled, sub silentio Kirschbaum Co. v. Walling." (R. 1309-1310.)

The interpretation accorded the *McLeod* case by the majority opinion of the Circuit Court curtails coverage of the Act as enunciated by this Court in *Overstreet v. North Shore Corporation,* supra; *Pedersen v. Fitzgerald Construction Co.,* 63 Sup. Ct. 558; *Walling v. Jacksonville Paper Co.,* 63 Sup. Ct. 332, and *Overnight Motor Co. v. Missel,* 316 U. S. 572. We do not believe it was the intent of this Court in the *McLeod* case to overrule the foregoing cases *sub silentio.* Those cases extended a coverage which entitled petitioners to the judgments rendered in their favor in the District Court. The coverage so extended is admirably expressed by Mr. Justice Murphy in the *Overstreet* case:

> "Respondent contends * * * that their (the employees') activities are local and at most only affect commerce. But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'. We said in the *Jacksonville Paper Co.* case, *supra,* 'It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce'. And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations. *Jacksonville Paper Co.* case, *supra,* and see also *Shanks v. D. L. & W. R.,* 239 U.S. 556, 558, dealing with what will shortly be pointed out as a similar question in the coverage of the Federal Employers' Liability Act. (63 Sup. Ct. 497.)"

In the *McLeod* case this Court stated that the employee involved supplied the personal needs of the maintenance-of-way men, and that food was consumed "apart from their work". This is the distinguishing feature of the instant case. Petitioners do not perform their work apart from the bank. They are the maintenance men. They constitute an essential part of the bank's business.

## CONCLUSION.

Petitioners respectfully submit that a writ of certiorari should issue.

Dated, San Francisco, California,
September 3, 1943.

MILTON D. SAPIRO,
*Counsel for Petitioners.*

CHARLES R. GARRY,
ALBERT PICARD,
FRANCIS MCCARTY,
*Of Counsel.*

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### CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for petitioners in the above entitled cause and proceeding and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 3, 1943.

MILTON D. SAPIRO,
*Counsel for Petitioners.*

**(Appendix Follows.)**

## Appendix

The provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., Section 201, et seq.), which are pertinent herein follow:

*"Finding and Declaration of Policy*

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

*Definitions*

Sec. 3. As used in this Act * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * * * *

*Maximum Hours*

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
* * *

*Penalties*

Sec. 16 * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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*Respondents.*

## BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI.

HERBERT W. ERSKINE,
625 Market Street, San Francisco, California,
*Attorney for Respondents.*

MORSE ERSKINE,
KEYES & ERSKINE,
625 Market Street, San Francisco, California,
*Of Counsel.*

PERSAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1943

Nos. 322, 323, 324

ATTILLIO SEMERIA, FRED FATTOR, CHARLES OSTERLYE, RALPH ROW, F. B. CODY, GEORGE MCBEAN, JACK MILLS, GALE PICKARD, ADOLPH LORENZETTI and CHARLES HARDY,

*Petitioners,*

vs.

THEODORE ROSENBERG, GUSSIE ROSENBERG, DOROTHY AIRHART, JUNE HOROWITZ and SIDNEY ROSENBERG, individually and as copartners transacting business under the firm name of American Building Maintenance Co. (a copartnership), and AMERICAN BUILDING MAINTENANCE CO. (a copartnership),

*Respondents.*

**BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI.**

## I. OPINIONS BELOW, JURISDICTION AND STATUTE.

The petitioners' statements with reference to the opinions below, the jurisdiction of this court and the statute involved are correct.

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## II. STATEMENT OF THE CASE.

The petitioners' statement of the case seems sufficient except in two respects:

1. The petitioners say (Petition, p. 4) that the Banks "are engaged in commerce * * *, and this was conceded by respondents in the court below (R. 1307)."

This reference to the record is to a statement of the Circuit Court of Appeals in its opinion that "appellants concede that the Banks are in commerce, but deny that appellees are engaged in commerce". The respondents did concede in the Circuit Court of Appeals that part of the Banks' business is interstate, but at the same time they contended that the bulk of their business is intrastate. For example, they said on page 45 of their opening brief in the Circuit Court:

> "In the trial court the Building Company (the respondents) contended that the Banks were not engaged in interstate commerce. In view of the decision of this circuit in National Labor Relations Board v. Bank of America, 130 F. (2d) 624, holding that part of the business of the Bank involved in that case was interstate commerce, we, of course, are not making this contention here. But assuming that a part of the

> Banks' business is interstate, still the bulk of it is intrastate; and therefore as in the Jacksonville Paper Co. case, it is necessary to determine which activities of the Bank were interstate and which intrastate commerce."

And the Circuit Court in its opinion said:

> "These banks are substantially engaged in interstate commerce, although the greater part of their banking business is intrastate in character." (R. 1306.)

2. The petitioner's statement of the case quotes the findings of the District Court, but omits one fact relating to the findings which in view of a contention made in the petition should have been stated. The petitioners in their three complaints allege that the Banks were engaged in commerce and also in producing goods for commerce. (R. 4-5; 1023-1024; 1183-1184.) The answers deny the allegation that the Banks were producing goods for commerce. (R. 39-40; 1043-1044, and 1204.) The trial court found that the Banks were engaged in commerce. (R. 181; 183-184; 1160, 1162-1163; 1271, 1274.) But it did not find that the Banks were engaged in producing goods for commerce; it made no finding at all with regard to this issue.

## III. ARGUMENT.

### 1. NONE OF THE GROUNDS SPECIFIED IN RULE 38 FOR THE GRANTING OF CERTIORARI EXISTS IN THIS CASE.

(a) As held by the Circuit Court of Appeals and as pointed out more at length later, *McLeod v. Threlkeld,* 63 S. Ct. 1284 has settled the fundamental legal issues involved in this case.

(b) In *Johnson v. Dallas Downtown Development Co.,* 5 Cir., 132 F. (2d) 287, the defendant, which owned and operated an office building, employed the plaintiffs as elevator operators and janitors. Many of the defendant's tenants were engaged in intrastate commerce, but, to quote the opinion of the Circuit Court of Appeals, "a substantial number of them were engaged, wholly or in part, in some type of interstate business or 'in commerce' within the meaning of the Act". None of the tenants were engaged in producing goods for commerce. The court in holding that the plaintiffs were not covered stated that the Supreme Court in the *Kirschbaum* case had given the production coverage a "broad construction"; but that it believed that Congress intended that the commerce coverage should not be "stretched or strained to cover every person whose labor is of use or convenience or whose labor in some fashion contributes to the convenience of one who is engaged in commerce".

The plaintiffs then applied to this court for a writ of certiorari. In their petition they stated that the Circuit Court had construed the Act in a way "probably in conflict with" *Kirschbaum v. Walling,* 316

U. S. 517, 62 S. Ct. 116; *Overstreet v. North Shore Corporation,* 318 U. S. 125, 63 S. Ct. 494; *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, 63 S. Ct. 332; that there were several other cases, including *Stoike v. First National Bank,* 290 N. Y. 195, 48 N. E. (2d) 482, "involving the identical question here at issue"; and that therefore it would be proper for this court to take jurisdiction and decide the point and thus terminate all the litigation then pending. But this court, before deciding the *McLeod* case, denied the application for the writ.

There is, of course, no difference between the case in which a janitor is cleaning and polishing in the offices of business, not a bank, engaged in interstate commerce and the case in which a janitor is doing such work in the offices of a bank. Although we understand that the denial of certiorari does not import any expression of opinion upon the merits of a case, *U. S. v. Carver,* 260 U. S. 482, 43 S. Ct. 181, still it seems plain to us that as this court found it unnecessary to issue a writ in the *Johnson* case, it surely will not, after its opinion in the *McLeod* case, in which it determined the points decisive in this case, consider it necessary to issue a writ in this case.

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**2. THE McLEOD DECISION IS CONTROLLING.**

The two fundamental issues involved in this litigation from its beginning are these:

First, what is the test that should be applied in determining whether an employee is engaged in com-

merce within the meaning of the Act; shall the formula be that anyone "facilitating" or "promoting" interstate commerce falls within the scope of the Act, so that the result will be in effect the same as though the Act had expressly provided that it should cover workers doing work affecting commerce; or shall the formula be more limited so that the Act will cover only those actually engaged in some phase of interstate commerce; and

Second, do the so-called production and commerce provisions of the Act cover commensurate areas; in other words, if it be held that a janitor working in an industry producing goods for commerce falls within the production coverage, does it follows that a janitor working in an industry engaged in commerce falls within the commerce coverage.

The *McLeod* case has settled both points against the contentions made by the petitioners throughout this litigation.

In the *Kirschbaum* case, the court said (316 U. S. 522, 62 S. Ct. 1119-1120):

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'. H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158-9266-67."

In the *McLeod* case, this court said that "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority"; and that the legislative history of the Act discussed in the *Kirschbaum* case showed that Congress' selection of the smaller group was *"deliberate* and *purposeful"*.

Parenthetically, we might say that the petitioners are asking that this court give the Act a construction that would be in defiance of this "deliberate and purposeful" intent of Congress.

This court in the *McLeod* case then stated that the test of the Federal Employers Liability Act was applicable, but that it would follow the cases holding that "each employment that indirectly assisted the functioning of" transportation "was not a part" of it. And it then laid down the test applicable under the Fair Labor Standards Act as follows (63 S. Ct. 1251-52):

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are *actually in* or *so closely related to the movement*[1] of the commerce as to a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase 'production of goods for commerce'."

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[1]All emphasis by italics are ours unless otherwise indicated.

It thus appears that the court in the *McLeod* case made it plain that it would abide by Congress' intent that the Act should not cover persons engaged in work affecting commerce; and also that it held that the commerce coverage of the Act was not as extensive as its production coverages. In other words, this court in the *McLeod* case ruled against both propositions which have constituted the basis of petitioners' claims since the commencement of this litigation.

It is clear that the most the petitioners can claim is that their work affected commerce; and it is equally clear that under the test laid down in the *McLeod* case the petitioners are not covered. As held by the New York Court of Appeals in the *Stoike* case, a janitor's work in a bank, "although it may contribute remotely to the comfort and convenience of those whose services are vital to its business, is not a step in the process of banking". And the Court of Appeals then said:

> "Indeed, as we consider the activities of those who conduct the vital functions by which the business of a commercial bank, such as the defendant, is accomplished, *the essential characteristics of that portion of its banking service which is interstate commerce are lost* before we reach the position held by the plaintiff."

In general, the interstate activities of the Banks in the cases at bar consisted in sending and receiving negotiable paper for collection, in transmitting and receiving credits, and in buying and selling securities. The plaintiffs are certainly not "actually in or so closely related to the movement" of this interstate

commerce on the part of the Banks "as to be a part of it." On the contrary, they play no part whatever in these transactions and are far removed from them. To paraphrase the *Stoike* case, the interstate commerce character of that portion of the Bank's business having this character is entirely lost before the positions held by the plaintiffs are reached. And as held in the *Stoike* and *Johnson* cases, the most that can be said for the plaintiffs is that the work of certain of them contributed to the comfort and convenience of those engaged in the interstate activities of the Bank, but this is certainly not enough.

Petitioners rely on Mr. Justice Denman's dissent in the case at bar. Mr. Justice Denman stated that the work of janitors in the case at bar in removing discarded papers and cleaning ink wells was similar to the work of a railroad gang cleaning passenger coaches used to carry persons interstate; that their work was "a direct aid" in interstate commerce; and that a bank which did not have janitors to keep dirt and dust from accumulating "would cease to function".

It is true that the officers and employees could not work in a building littered with dust and dirt; but neither could they work in a building that was not properly heated and ventilated, that did not have running water and its plumbing in repair, that did not have its broken windows mended, and its floors and other parts kept in repair. The work of the janitors is no more an aid to the interstate commerce transac-

tions of the Banks than the work of the plumbers, glaziers and carpenters who keep its building in repair.

Mr. Justice Denman's comparison between cleaning an ink well and cleaning a railroad car is not at all convincing. The Bank officer who dips his pen into an ink well may use the ink to sign a draft or a letter of credit used to establish a credit out of the state; but he may use it to sign a letter to his friend or relative, or a letter relating to a purely intrastate transaction, or for a variety of other reasons. But the railroad car which is cleaned by employees of the railroad company is an instrumentality of commerce and can only be used for the transportation of freight and passengers. Surely an inkwell cannot be regarded an instrumentality of commerce like a passenger coach. And if the employees involved in the *Shanks, Bolle, Industrial Commission* and *Bezue*[2] cases, which were approved by this court in the *McLeod* case, were not engaged in commerce, then janitors cleaning inkwells and removing discarded papers in bank offices cannot be so regarded.

The lower courts in the eighteen cases cited in the note have been practically unanimous in holding that building service employees working in buildings occupied at least in part by persons engaged in interstate

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[2]*Shanks v. Del. Lack. & West. R. R.*, 239 U. S. 556, 558, 36 S. Ct. 188, 189; *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 78, 52 S. Ct. 59, 61; *Chicago & E. I. R. Co. v. Commission*, 284 U. S. 296, 52 S. Ct. 151; *New York N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 419, 52 S. Ct. 205, 206.

commerce are not covered by the Act.[3] Certainly this unanimity of judicial opinion should be given great weight.

There can be no doubt that the Circuit Court of Appeals in the case at bar was correct in holding that the *McLeod* case is controlling.

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**3. THE ISSUE WHETHER THE BANKS WERE ENGAGED IN THE PRODUCTION OF GOODS WAS NOT BEFORE THE CIRCUIT COURT OF APPEALS, NOR IS IT BEFORE THIS COURT; BUT IN ANY EVENT THE BANKS WERE NOT ENGAGED IN THIS ACTIVITY.**

The petitioners' statement of what the evidence showed respecting this point is inaccurate. They say that the Banks "actually 'produced' or issued various types of commercial paper such as drafts, bills of exchange, letters of credit * * *". (Petition, p. 9.)

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[3]*Cochran v. Florida Nat'l Bldg. Corp.*, 5 Cir., 134 F. (2d) 615; *Tate v. Empire Bldg. Corp.*, 6 Cir., 137 F. (2d) ....., 6 W. H. R. 571; *Johnson v. Dallas Downtown Development Co.*, 5 Cir., 132 F. (2d) 287; *Burton v. Zimmerman*, 4 Cir., 131 F. (2d) 377; *Johnson v. Filstow, Inc.*, D. C. Fla., 43 F. S. 930; *Lofther v. First Nat'l Bank of Chicago*, D. C. Ill., 48 F. S. 692; *Johnson v. Masonic Bldg. Co.*, D. C. Ga., 6 Labor Cases 61,301; *Hinkler v. Eighty-Three Maiden Lane Corp.*, D. C. N. Y., 50 F. S. 263; *Convey v. Omaha Nat'l Bank*, D. C. Neb., 7 Labor Cases 64,697; *Callus v. 10 East 40th Street Bldg., Inc.*, D. C. N. Y., 7 Labor Cases 64,806; *Wideman v. Blanchard & Calhoun Realty Co.*, D. C. Ga., 50 F. S. 626; *Bartholome v. Baltimore Fire Patrol*, D. C. Md., 48 F. S. 98; *Noonan v. Fruco Const. Co.*, D. C. Mo., 50 F. S. 432; *Stoike v. First Nat'l Bank*, 290 N. Y. 195, 48 N. E. (2d) 482; *Matter of Liquidation of New York Title & Mortgage Co.*, N. Y. Sup., 39 N. Y. S. (2d) 893; *Patterson v. Memphis Cotton Exchange Realty Co.*, Tenn. Ch., 6 W. H. R. 308; *Johnson v. Hamilton Nat'l Bank*, Tenn Ch., 6 Labor Cases 63,791; *Johnson v. Great Nat'l Life Ins. Co.*, Tex. Civ. App., 166 S. W. (2d) 935.

Now what the record really shows respecting this matter is that the Banks transmit funds to banks outside the state and that banks outside the state transmit funds to them (R. 241-242), and that this is done by transfers of credit, either by the use of drafts or by telegraphic instructions (R. 241-245; 263-264; 363-364.) At times a draft drawn by one of the Banks on an out of state bank is not presented to the drawee bank for payment; but passes from hand to hand and is ultimately paid by the bank issuing it. (R. 263-264.) And the Banks in connection with the importation of goods issue letters of credit for the purpose of establishing credits in foreign banks. These letters are in the form of a letter addressed to the foreign bank requesting it to establish a credit in favor of the foreign shipper. (R. 267-269; 354-357; and 359; 387-388.)[4]

These are the facts shown by the record, not the petitioners' conclusions with respect to the facts.

The petitioners also say that the banks "produced" "new issues of stock". (Petition, p. 9.) The record relating to this point is that the trust department of the Bank acts as the transfer agent of corporations (R. 518-519); and that when it acts in this capacity it is as the name implies the agent of the corporation for the keeping of its stock books and the transfer of its shares. (R. 519-520.)

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[4]The officers of the American Trust Company testified at length with regard to the business of that Bank, particularly the business involving relations with persons outside the state; and it was stipulated that the activities of the other two Banks were the same (R. 638-644, 646, 700-704, 1234-1235).

The petitioners also state that the banks "supply information on request of investors". (Petition, p. 9.) But what the record shows is that on occasions the Banks give investment advice to their customers; that they are not in the business of giving this advice; and are not investment counsellors and are not paid for investment advice; but if a customer wants information with regard to the financial standing of some person or the value of a security, the Banks if in a position to do so will answer the inquiry. (R. 508-510.)

There is no person engaged in business who does not issue checks and who does not render information in some way or other to those with whom he is dealing. Therefore, if the petitioners' suggestion were correct, practically everyone in the business world would be producing goods within the meaning of the Act. This could not have been the intent of Congress.

But even if the Banks were producing goods within the meaning of the Act, the petitioners are not in a position to raise the point. It is true that they did argue the point in the Circuit Court of Appeals and that that court in the course of its opinion stated that the petitioners were "not in any sense engaged in production." But as we have already pointed out, the pleadings in the cases raised the issue whether the petitioners were engaged in production, but the trial court did not make any finding with respect to this issue. Neither the Circuit Court of Appeals nor this court may make such a finding. (Rule 52 FRCP; the annotation following this rule in 28 USCA 723c, p. 677; *Matton Oil Transfer Corporation v. The Dy-*

*namic,* 2 Cir., 123 F. (2d) 999; *Selby Oil & Gas Co. v. Railroad Commission,* 5 Cir., 128 F. (2d) 334; and *Mayo v. Lakeland Highlands Canning Co.,* 309 U.S. 310, 316, 60 S.Ct. 517.)

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## IV. CONCLUSION.

For these reasons we respectfully submit that the petition be denied.

Dated, San Francisco, California,
September 27, 1943.

Respectfully submitted,
HERBERT W. ERSKINE,
*Attorney for Respondents.*

MORSE ERSKINE,
KEYES & ERSKINE,
*Of Counsel.*